# "Fair Share"

## Ontario Women's Conference on Family Property Law

October, 1974

Ontario

The Honourable Margaret Birch,
Provincial Secretary
for
Social Development

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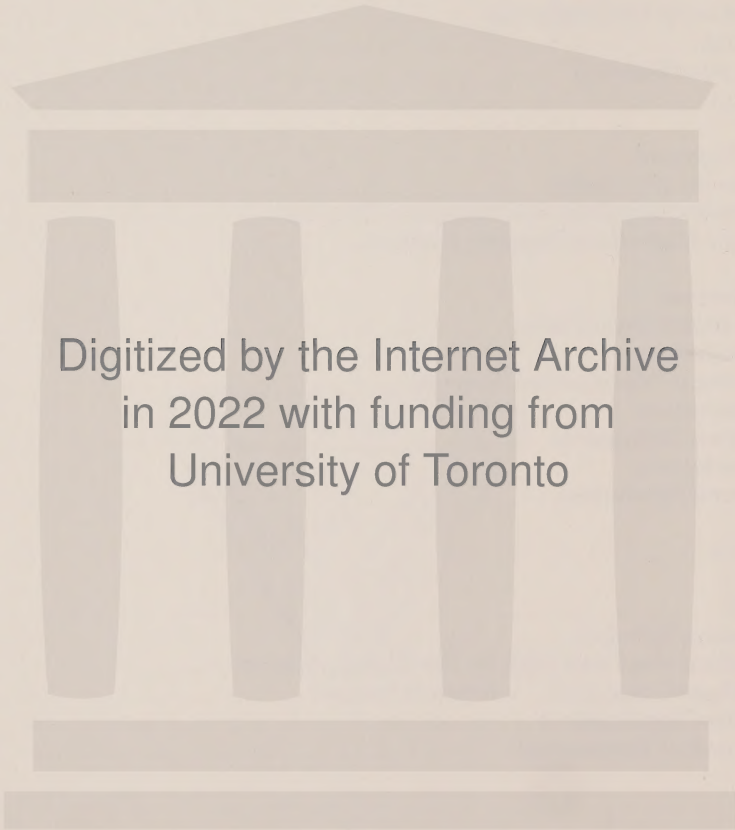


Ontario

The Premier
of Ontario

Parliament Buildings
Queen's Park
Toronto Ontario

October, 1974.

It is with great pleasure indeed that I extend, through my good friend and colleague Margaret Birch, a very warm welcome to those who are attending the 1974 Conference on Family Law at Queen's Park. Those of us who are concerned with the quality of life in our generation are aware that as changes occur in the lifestyle of the majority of Ontarians, so administrative attitudes must strive to accommodate those changes.

I am therefore delighted to express my gratitude, and that of the Government of Ontario, to those who have come to our Provincial capital to participate in this extremely important dialogue on Family Law.

I sincerely hope that the meeting will be both deeply interesting and highly productive.

William G. Davis,
Premier of Ontario.

# Preface

"It's a whole new ball-game!" said Laura Sabia, Chairman of the Ontario Status of Women Council. "For the first time women will be involved in the reform of the law".

She was speaking at the press conference held at the Ontario Parliament Buildings a few days before the women's conference to discuss the reform of family property law. Mrs. Sabia was understandably enthusiastic.

The Ontario government wants to review and reform the laws covering matrimonial property — who owns what during and after marriage. For the first time women had successfully organized themselves to the point that the Attorney-General of Ontario had agreed to wait with his proposed new laws till the opinions of Ontario women had been solicited.

No one was naive enough to believe that gathering the opinions of the women of Ontario would be a simple matter. No one expected that at the end of the three-day conference a neat consensus could be wrapped up and delivered to the Attorney-General. There were different interest groups, different opinions, different life-styles and values to sort out. But it was the start of a new approach to law-making.

Following is a guide to what happened in the three days of discussions. This booklet, produced by the Ontario Secretariat for Social Development, is intended to do more than simply record what happened. In gathering together the themes and concerns of the 500 women who attended the "Fair Share" Conference, it is hoped to stimulate further discussion and wider involvement in the law-making process by the women of Ontario.

# Introduction

The October, 1974 "Fair Share" Conference to discuss family property law grew out of a series of events that began much earlier. Legislative reform of Family Property Law started with the appointment of the Research Team of the Family Law Project under the auspices of the Ontario Law Reform Commission created in 1964. This team was to gather information for new family property laws and ultimately to present recommendations for new legislation to the Attorney-General of Ontario.

Although divorce is a Federal matter, matrimonial property laws come under provincial jurisdiction. Under the present Ontario law title, a financial contribution determines ownership of property. A wife's contribution as homemaker has no legal clout when determining ownership of any asset. Women discovered this could be carried to an extreme if a wife, for example, purchased something out of money saved from her household allowance. Legally speaking, since the allowance had come from her husband, whatever she purchased with the savings was "owned" by him. By the 1970s women had begun to make known their impatience with the economics of matrimonial property law.

The Ontario Status of Women Council came into being in 1973. It was created under the Ontario government's action plan for Equal Opportunity for Women in Ontario and reports to the Legislature through the Provincial Secretary for Social Development.

From the earliest days of its creation it was evident that the Status of Women Council was going to be a gadfly to the Ontario government. It refused to sit quietly rubber-stamping memos and writing routine press releases. The Council wanted to generate action.

One of the Council's earliest moves was to check up on what was happening to the Family Law Project started back in 1965. To find out, the Council invited the Assistant Deputy Attorney-General to their first meeting. At their second meeting the Chairman of the Ontario Law Reform Commission was on the spot. By March, 1974, nine years after the start of the Family Law Project, but less than six months after the creation of the Status of Women Council, the Family Property Law Report was tabled in the Legislature.

When the Attorney-General said that his department would not submit any legislative proposals for major changes in the family property law until the Ontario Status for Women Council stated its position, the Council decided to organize a conference on Family Property Law. The Conference, to be held in Toronto in October, 1974, and paid for by the Secretariat for Social Development, was to bring together as broad a representation of women from across Ontario as possible.

The women would have studied the Ontario Law Reform Commission's report and related material and would be prepared to discuss the report's implications and possibly make recommendations of their own for the consideration of the Attorney-General.

# Organization of the Conference

## Delegates

Choosing delegates to represent every socio-economic group in Ontario is no mean trick. No method is foolproof. But the Council tried.

Funds and facilities were available for 500 delegates. It was assumed that some women would not be able to afford the total cost of attending the three-day conference and provision was made to assist such delegates.

The Status of Women Council contacted all of the 600 organizations and individuals who had ever been in touch with the Council. Names of other organizations were collected from newspapers, mailing lists and members of the Council. A preliminary letter was sent inviting participation in the conference. Large organizations were permitted a maximum of five delegates. The letter asked that the selection of delegates "be representative of women from varied backgrounds and lifestyles, (geographic, economic, cultural, age, etc.) to cut across all socio-economic structures ...".

The obvious problem was to limit the number of Toronto delegates in order to ensure geographic and economic distribution. To do this, Council held back 100 seats until it was sure it had the maximum possible representation from the rest of the province.

In fact, just about everyone who was interested in the Conference was accommodated. Women from 96 communities across Ontario came to Toronto. One perfectly non-scientific study suggested that the mixture of work-jeans, dresses and skin hues was just about representative of Ontario's population.[1]

## Background Material

Each delegate was sent material that included the Ontario Law Reform Commission recommendations, two summaries of it by the Status of Women Council, opinion pieces on proposed reforms and a glossary of legal terminology.

## Program

Delegates were assigned to workshops to ensure a proper balance. (This avoided special interest groups — people of like viewpoints — all being concentrated in one workshop).

[1] See Appendix for list of communities & organizations represented.

Each workshop was assigned a leader briefed in advance on the material to be covered and a "resource person". The resource people were lawyers, mostly specialists in family law.

Each workshop discussed and examined various aspects of family law and voted on as many recommendations as they had time to discuss. All recommendations that got a majority vote in the workshop were passed on to the resolutions committee.

On the final afternoon the major recommendations from the various workshops were brought to a plenary session of all the delegates. After discussion on the floor, much of it heated, the resolutions were voted on.

All delegates had also received, in advance, a questionnaire designed to elicit their views in detail on every aspect of family property law as well as support obligations. Since many delegates were mailing in the questionnaires after the Conference it was clear that the report of the Ontario Status of Women Council to the Attorney-General would include not only the resolutions voted on at the final plenary session and the recommendations of the workshops, but also the responses from the questionnaires to be evaluated by a team at the University of Toronto.

# Legal Background: Family Property Law

## The Law As It Is Today

The fact of marriage *alone* does not give the wife any property rights in Ontario today, except her dower interest. Separate property is the system used in Ontario to figure out who owns what during marriage and at marriage break-up. That means you only own what you actually paid for.

If a wife makes any of the mortgage payments or car payments she may stand a chance of establishing part ownership. But if any money she earns goes to pay the grocery bills, she's out of luck when it comes to deciding, for example, who owns the house.

The wife's contribution as homemaker is not recognized as having any bearing on ownership of property, even though many women agree that their washing of diapers, feeding of spouse and children and general managing of the household economy may have a significant effect on their husband's ability to acquire assets.

Marriage does give a wife *dower*, which is a one-third interest after her husband's death in any land owned outright by the husband during marriage. But dower isn't much help to a wife either during marriage or at divorce, except as a possible means of blocking her husband from selling his property.

Marriage does relieve the wife of the necessity of supporting herself or her children. Under the law a husband is obligated to provide his wife and children with the goods and services suitable to their station in life. This is not reciprocal. Except as modified in divorce proceedings, no such obligation exists for women — even women earning more than their husbands.

Women in Ontario have become increasingly unhappy with laws that do not expressly give any economic value to the role of homemaker. This unhappiness came to a head with the case of Mrs. Irene Murdoch, the Alberta rancher's wife. Mrs. Murdoch worked next to her husband on the farm for 25 years. After she separated from him she sued for a half-interest in the farm. The court decided that the 25 years she had worked on the farm was the ordinary contribution of a wife and as such Mrs. Murdoch received no recognition as part owner of the farm she and her husband had built.

Although Mrs. Murdoch may get a considerable lump sum of money now that she has begun divorce proceedings, that money will still not legally recognize any ownership by her of the farm, and the amount of the award will depend on the discretion of the court.

As well as property considerations there still remain, on the books at least, a

number of laws in Ontario that tie a wife's interest in her husband's estate and her right to support the concepts of fidelity and chastity that many women feel to be demeaning and out-dated.

## The Ontario Law Reform Commission Proposals[1]

What follows is a very general summary. If you haven't read the original proposals you might be well advised to obtain them. (see footnote 1).

The Law Reform Commission sets out a scheme for dividing up property *when a marriage breaks down.* Their system is called deferred community of property. That means husbands and wives would own everything separately during marriage — just like now — with the one exception of the Matrimonial Home, which would always be jointly owned no matter who had paid for it, unless the wife owned it before the marriage — in which case she would keep it. (This is not reciprocal. If the husband owned the home before marriage, he has to share it with the wife).

In the event of marriage break-up the family property would be equally shared. The husband and wife would add up the value of everything they own in two separate lists. (For example, her list might include her own savings account, furniture she bought with her part-time job earnings, a car she paid for. He may own a small business, some bonds and the summer cottage). They each deduct from their list personal items (like clothing and jewelry), gifts, the value of property they owned before marriage and existing debts and liabilities. Now they have two totals. These figures are added up and divided by two. This final figure is the amount of money with which each partner should walk out of the marriage. Whoever has the smaller total is owed money by the other partner equivalent to the amount necessary to make up two equal shares.

Arguments against this system of sharing property include the fact that it does not provide for sharing of property *during* marriage. Other criticism has been that the rules are too rigid and inflexible and do not take into account the unique circumstances of individual marriages.

## Alternate Methods of Property Division

**Judicial discretion** This method is now in effect in England. No strict rules are set up for division of property at marriage breakdown. The courts have

[1] The full text of these proposals is available from the Ontario Law Reform Commission, 18 King St. East, Toronto, Ontario. A detailed summary of the proposals is available from the Ontario Status of Women Council, 801 Bay St., Toronto, Ontario.

discretion to share the property regardless of who paid for it or in whose name it may be. Guidelines help the courts make their decisions. These guidelines include: length of the marriage; needs of each partner; the earning capacity of each partner; contribution of each spouse to the marriage (including the contribution as homemaker); physical and mental disabilities of either partner, and the standard of living enjoyed during the marriage.

Opponents of this system argue that you can't ever be certain of what the court will award. Husbands and wives are dependent on the decisions of judges who may be emotionally biased in their judgements.

**Full Community of Property** Community means that the husband and wife co-own everything during marriage as well as at the dissolution of the marriage. Generally speaking, this sharing would cover all assets acquired while the couple are married. A husband's pay cheque or a wife's business earnings would be shared 50-50 by the spouses.

This approach has the advantage of giving both spouses an equal share throughout the marriage. But it does present some problems in administration. Usually one spouse has to administer the property and usually that's the husband. If both spouses administer community every cheque and business or personal transaction may have to be co-authorized. Tax disadvantages may penalize spouses who pool two incomes and special problems arise with debts, pension plans, insurance, and spouses who travel.

Because of practical difficulties in operating a community regime, most European countries (and the province of Quebec) that have tried community have either abandoned the system or are in the process of altering it.

**Marriage Contracts** At the moment couples in Ontario can draw up contracts to cover management of property *during* marriage (for example: she owns the summer cottage, he owns the house, future property will be owned by him) but they cannot make a contract that spells out how they will divide property in the event of marriage breakdown. Such a contract would not be legally valid in Ontario. Legislation could be introduced to permit such contracts.

These contracts would allow maximum flexibility in property sharing arrangements. Couples could choose their own system to suit their own circumstances and values. Educational courses explaining the various options could be made available so that couples would be fully informed of their rights and responsibilities before contracting.

Opponents argue that contracts might be complicated and expensive to draw up, which could mean few people would bother to do it. Other objections include the uncertainties at the beginning of a marriage (how can you know in advance what your financial circumstances and needs may be in twenty years?).

# The Conference

It was in the workshops that most of the discussion and examination of issues took place. Each workshop had from 15-20 participants as well as a Chairman and a resource person. The Chairmen were to moderate discussions but not to influence them. The resource people provided legal advice. There were four separate workshop sessions.

Although discussion in the workshops was free-ranging and unrestricted, three main areas were concentrated on: (1) the matrimonial home, (2) sharing of matrimonial property and (3) support obligations.

## The Matrimonial Home

The Ontario Law Reform Commission thought the matrimonial home to be important enough an issue to provide separate legislation on it that, unlike the rest of their proposals, would be *retroactive* to apply to all existing marriages in Ontario.

Today, whoever paid for the home or holds title to it (with some exceptions) owns it. The OLRC recommended that the matrimonial home always be co-owned, irrespective of who paid for it or in whose name the house is registered. The only exception to this would be cases in which the wife owned the home before the marriage. She, according to OLRC recommendations would be entitled to keep the home entirely for herself.

Conference delegates agreed that often the matrimonial home would be the only real asset in a marriage and therefore was a matter of special interest. Among the concerns raised were the following:

— property prices in Ontario are rising and more and more families are renting homes. What special provisions could be made for rented homes? Should there be special legislation for the taking over of leases since divorced and separated women may encounter difficulties in renting premises?

— what freedom should donors such as parents have in making a gift of a matrimonial home? Should they be able to specify that ownership be vested in one spouse only? Would automatic co-ownership make parents reluctant to give such a gift?

— what about marriages with more than one residence? Should summer cottages, etc. be shared?

— if the matrimonial home were co-owned should the spouse with custody of the children have some legal preference in the right to *occupancy*?

Conference delegates, with very few exceptions, were in agreement that the act of getting married should automatically make spouses co-owners of the matrimonial home. It was generally felt that such issues as: behaviour of the spouses, length of the marriage and financial contribution to purchase of the home, would not be relevant as to ownership of the matrimonial home.

Delegates did not have sufficient time to vote on all the resolutions concerning the matrimonial home. Following is a list of resolutions voted on and, where significant, an estimate of the vote breakdown:

RESOLVED: That the principle of co-ownership in the matrimonial home should be adopted: a principle that would entitle the husband and wife to equal shares in the home secured by their joint control and rights of occupation, retained for their joint enjoyment and capable of being disposed of or otherwise dealt with only with the express consent of both spouses or by order of the court. (In favour 98%).

RESOLVED: That co-ownership of the matrimonial home should be given immediate and retroactive effect as a general principle which, with some exceptions, should apply to all matrimonial homes; whether brought into marriage by one of the spouses or acquired during marriage; whether title is held in the name of both spouses or in the name of one spouse only; and notwithstanding the fact that one of the spouses may have made no financial contribution at all to the acquisition, maintenance or capital improvement of the home. Title to be registered as a matrimonial home with choice of joint tenancy or tenants in common be left to the spouses. (In favour 80%).

RESOLVED: Be it resolved that the behaviour of the spouses should not be taken into account, if the matrimonial home is co-owned. (In favour 90%).

RESOLVED: That the fact that the home was a gift or a legacy to one spouse alone should not be taken into account if the matrimonial home is co-owned. But on dissolution, house should go to person to whom it was willed or gifted with compensation to other spouse subject to judicial discretion regarding undue hardship. (In favour 80%).

RESOLVED: That the matrimonial home as between husband and wife should be co-owned by husband and wife with the opportunity to opt out of this arrangement. (In favour 60%).

RESOLVED: That if the principal residence is rented, consideration be made to co-owning other property such as a cottage. (In favour 90%).

RESOLVED: That if the matrimonial home is shared, each spouse should NOT be free to pledge the home as security for business ventures, but that the two spouses together should be free to pledge the home as security for their joint

business venture. (105 votes in favour, 80 opposed, substantial number of abstentions).

RESOLVED: That we are in favour of co-ownership of the matrimonial home by both spouses and any transaction regarding the matrimonial home requires the written and witnessed consent of both parties. (In favour 95%).

## Sharing of Matrimonial Property

Debate of this question involved the most basic issues of the conference. This was the time when delegates could decide whether they wished to retain the present separate property system, recommend the deferred community system of the OLRC, or suggest an alternate approach, such as full community of property or judicial discretion.

Who gets what when a marriage ends was the most exhaustively debated topic of the conference. Many factors were taken into consideration before delegates drafted their resolutions. They included:

— is marriage an economic partnership? Does the fact of marriage alone entitle a spouse to a share of goods to which they have not financially contributed? If so, what share?

— what is the value of a homemaker? Can it be given a precise value? Is it of sufficient value to entitle a homemaker to half of all the other spouse acquires?

— if wives are entitled to a share of the matrimonial property, should they also be entitled to support?

— as women enter the labour market in greater numbers and purchase goods and property themselves, will they be willing to share their property with their husbands if the marriage breaks up?

— if spouses are to split the profits of marriage should they also split the losses (i.e., debts) that either spouse has acquired during marriage?

— could joint owner of assets, either during marriage or at the dissolution of marriage, make credit and business dealings difficult? Would businessmen be reluctant to extend credit or deal with a business that might have to be liquidated in order to pay off a spouse?

— should personal conduct be taken into account in the sharing by spouses in the assets of a marriage?

— should couples have the right to opt out of any system of property sharing and draw up their own system?

— should sharing occur only at the end of a marriage or is there a way to provide for sharing during the partnership?

Delegates wanted to arrive at principles that would be both fair and just but would also reflect the economic realities, as they saw them, of women's position in the labour market. Delegates faced the perplexing problem of trying to fashion absolute principles pragmatically.

The majority of delegates believed that the wife's role as homemaker entitled her to an equal share of matrimonial property, without regard to concepts of behaviour, the length of the marriage, or the financial contribution to acquisition of assets. Among the delegates who opposed this view were some businesswomen who felt that assets they had achieved through hard work should not necessarily be shared with less productive or non-productive husbands.

Although delegates did not have time to vote on all the proposals concerning the details of a new property sharing system, the conference did approve the immediate implementation of a system of deferred sharing, with the ultimate aim of a system of joint administration of all property during marriage.

Following is the list of resolutions delegates approved on property regimes, with a breakdown of the vote where significant.

RESOLVED: That marriage should be considered an economic partnership regardless of the division of labour between the spouses. (In favour 98%).

RESOLVED: That the fact of marriage itself should create new property rights based solely on the marriage. (In favour 90%).

RESOLVED: That a deferred sharing system be implemented immediately and that an ultimate goal would be joint administration by the spouses of the income and property acquired during the marriage. (In favour 75%).

RESOLVED: That spouses who do not want to be subject to the matrimonial property regime should have the power to agree to one of the following alternatives after each spouse has received independent legal advice,

(a) to choose the separate property regime; or,
(b) to choose the foreign property regime provided by the law of the habitual residence of either the husband or the wife at the time of marriage, if per-

mitted to do so according to the choice of law recommendations made in this report; or,
(c) to arrange by express contract, the particular terms that are to govern their relations with respect to property. (In favour 85%).

RESOLVED: That in addition to the sharing upon termination of the marriage, there should be a sharing during the currency of the marriage of the control of an ownership in that property which the spouses jointly use and enjoy. (In favour 90%).

All legislation aimed at reforming the matrimonial property laws of Ontario must be made retroactive — i.e., the legislation must apply to existing marriages. (In favour 95%).

Any recommendations in this Report requiring termination or adoption of an alternate property system, by consent of both parties will be subject to the following procedure:

(1) Evidence that each spouse has received independent legal advice.
(2) Evidence of a written and witnessed consent. (In favour 51%. Large number of delegates abstained).

That to terminate any property system both parties must —

(1) Receive independent legal advice, and
(2) sign a written witnessed consent, and be endorsed by a Judge. (In favour 75%).

The household goods should be co-owned. (In favour 80%).

## Support Obligations

The Ontario Law Reform Commission had not (at time of this printing) released its report on support obligations. However, in their report on Family Property Law did make some general support recommendations. These recommendations included the concept that spouses should have a mutual obligation to support one another and their children, but that the primary financial liability for support should rest with the husband.

In trying to assess support obligations delegates faced a number of questions.

— If a deferred community of property system were to be introduced, should spouses have to pay support to one another as well?

— How long should support payments continue?

— Was the spouse who looked after the children entitled to consider the work of raising the family as equal to a financial contribution to their support? Would the age of the children have bearing on this?

— To what extent should wives be liable to support their husbands? If a wife is earning more than the husband or if the husband has a mental, emotional or physical disability, should the wife have primary liability for child support and maintenance of the husband?

— What standard of living should support payments maintain? The necessities of life? The standard of living the spouse enjoyed before the marriage? The standard of living during the marriage?

Once again delegates did not have time to vote on all the recommendations. But it was clear that the majority of the delegates were re-thinking support concepts. They did not see support as a never-ending liability to spouses (except perhaps in special cases of disability) and the emphasis was very clearly on developing arrangements that would utlimately aid self-sufficiency of husbands and wives after the dissolution of the marriage. Concern was voiced over safe-guarding the standard of living of children of broken marriages. But in many workshops the feeling surfaced that it was both unrealistic and unfair to expect a husband to maintain a wife with the standard of living enjoyed during the marriage when there were now two households instead of one to pay for.

But the greatest area of concern was not so much with changing the laws as *enforcing* them. Accounts of the difficulties deserted wives faced in collecting support payments were heard in all discussions on support obligations. Delegates were adamant in the need to improve the fragmented court system administering family law and in the need to develop more effective and less costly procedures for collecting defaulted support payments.

Following is a list of the resolutions approved by the conference.

RESOLVED: That each spouse, to the best of his/her ability and means should have a legal duty to support the other spouse. (In favour 60%).

RESOLVED: That specific matrimonial offences should not be relevant for support claims. (In favour 98%).

RESOLVED: That support for a spouse after termination or breakdown of marriage should not be a life-time benefit but continue only until the spouse becomes able to support himself or herself. (In favour 95%).

RESOLVED: That both parents should have equal responsibility to support the children of the marriage. (In favour 98%).

RESOLVED: Whereas the default of maintenance and support payments creates injustice and undue complications and hardship, be it resolved that in the event of default of maintenance and/or support payments, the onus be on the Minister of Community and Social Services for adequate maintenance and court action under Section 6 of the Deserted Wives and Children's Maintenance Act. (In favour 97%).

RESOLVED: Whereas one of the major problems of enforcement of support obligation is the case of the obligated spouse leaving the jurisdiction, be it resolved that the Province in conjunction with the Federal Government arrange access to the Provincial and Federal Income Tax Returns, in order to allow the tracing of the delinquent ex-spouse. This would be upon court order and all information, save address and employment status, would remain the confidentiality of the Court. (In favour 94%).

RESOLVED: That the existence of the concept of illegitimacy be removed from the laws of Ontario. (In favour 100%).

## General Resolutions

Delegates were concerned with a number of questions that were not directly a part of family property law. They were concerned with ancillary matters:

— How best to educate people and inform them of their rights and responsibilities concerning property and support obligations *before* marriage rather than at dissolution.

— How best to publicize the debate on family property law and ensure the maximum possible participation of women in the debate.

— How to improve the administration of the law.

There was also a strong concern that the debate on family property law and related matters not end with the conference. The conference participants, as involved as they were, realized they did not represent all women of Ontario. Large numbers of women, both rural and urban, from all parts of Ontario had yet to be heard from. Delegates were especially anxious that a maximum effort continue to be made by the Ontario Status of Women Council with the assistance of the Ontario Secretariat for Social Development to solicit the views of as many women as possible. Participants were also anxious that the many hours of debate and all the words and resolutions of the conference should come to more than a few reports and press releases.

These various concerns were reflected in a number of General Resolutions approved by the plenary session and here listed:

RESOLVED: That immediate steps be taken to implement a unified family court system to deal with all matters relating to marriage, divorce, custody, support, property division and other related family matters and that the adversary system as a means of resolving such matters be de-emphasized and alternate methods be sought and developed.

Whereas we are of the opinion that the persons assembled at this conference are not representative of all the persons in Ontario and whereas we are of the opinion that many persons in the province are not even aware that this conference is taking place, be it resolved that the Secretariat for Social Development do all in its power to publicize the resolutions adopted at this conference before any legislation is passed in order that there may be even more input by the persons of Ontario.

Whereas much of the inequity of any property system is a result of a lack of knowledge of the legal responsibilities and legal implications of marriage, we recommend that before a couple can be lawfully married, counselling as to the ramifications of marriage be given before the marriage licence is issued or in cases where a licence is not required, before the marriage ceremony is performed.

We further recommend that information about the responsibilities and implications of marriage be given to all children through programs in the school system.

That in any new legislation the words "husband" and "wife" be replaced by the word "spouse", unless there is a compelling reason to do otherwise.

Understanding that the Status of Women Council has the responsibility of presenting the recommendations of this Conference to the Secretariat for Social Development and to the Attorney-General of Ontario:

Resolved that the Council demand draft legislation from the government departments involved in response to the recommendations of this Conference within one year of this date.

Resolved that the Status of Women Council arrange for a public review in one year's time of the actions taken by the Ontario government in response to the demands of this Conference.

# Conclusion

The workshops produced about 1,000 resolutions. Many of these overlapped, either in content or intent, and the resolutions committee boiled them down to 100 resolutions. These 100 resolutions reflected the primary concerns of the workshops and were presented to the plenary session on the final afternoon of the conference.

The propositions that were defeated by the plenary session reveal much about the attitude and trends of the conference. For this reason, in the appendix, we have listed resolutions that were defeated. We have also listed resolutions on which delegates did not have time to vote. Readers may wish to study and consider all of these resolutions as starting points for further discussion.

The conference marked another effort by Government to increase participation by citizens in the legislative process. It is hoped that delegates will continue discussions in their home communities and that more and more Ontario residents will make their feelings about matrimonial property laws known to the Attorney General.

# Appendix

# Appendix

## Resolutions defeated by the Plenary Session of the Ontario Women's Conference on Family Property Law

1. Be it resolved that a full and immediate community of property regime be instituted as the matrimonial property law of Ontario.

2. Resolved that a deferred community system should be introduced, called the matrimonial regime as recommended by the Ontario Law Reform Commission, e.g., separate as to property during the currency of the marriage and a sharing upon termination; combined with judiciary discretion on the principle that each spouse is presumptively entitled to the benefits of the deferred community system and with the option to enter into a contract if desired.

3. There be a total community of property regime that applies 50-50 during marriage, with the statutory opportunity for either spouse to apply to a court in a summary manner for a redistribution of the property, based on consideration of the conduct, means and circumstances of both spouses.

4. Resolved that judicial discretion be a factor in property law settlements; also that a deferred community system in conjunction with judicial discretion that operates within specified guidelines be adopted for property settlements.

5. Resolved that any regime adopted should automatically apply to *all* marriages and that spouses could opt out of the regime.

6. Resolved that a matrimonial home acquired during the marriage be jointly owned, title to be registered as a "matrimonial home" with choice of joint tenancy or co-tenancy to be left to the spouses.

7. Resolved that the matrimonial home be protected from seizure by creditors.

8. Be it resolved that the principle of co-ownership should not operate so as to preclude a donor of a matrimonial home (or of funds to be used to acquire such an asset) from transferring the entire beneficial interest therein by way of gift to one of the spouses where it is the donor's intention to benefit only that spouse, but the courts should be given authority to award the other spouse an interest in the home in recognition of improvements made, maintenance of that home, tax or mortgage payments made, or other financial or non-financial contribution to the upkeep of the matrimonial home made by such spouse.

9. Resolved that the legal duty to support should be confined to such cases of

incapacitation as: unable to work, aged, blind, crippled, mentally deficient or disabled.

10. Resolved that, in question of support a spouse claiming support should have a duty to minimize the amount needed.

11. That the government recognize child-rearing as an essential professional service to the society and that it be paid for by the society.

## Resolutions Not Dealt With By the Plenary Session

1. Resolved — We would support a system based on the present law of separate property but with the widest possible judicial discretion with guidelines.

2. Resolved that in any legislation general court discretion should be preserved to deal with any inequities that might be produced by a strict division of property.

3. That any exercise of judicial discretion in sharing property should not be on the basis of any concept of matrimonial fault.

4. Be it resolved that relief under the Dependents Relief Act not be dependent upon chastity for either spouse or entitlement to alimony and no waiver be permitted under this Act by either spouse.

5. Resolved that during the currency of a marriage a spouse have access to court protection against squandering by the other spouse.

6. Resolved that a court upon the termination of a regime, can order compensation for squandering that took place during the marriage.

7. Resolved that items included in household goods category should include all goods used by the family in common for family purposes.

8. Be it resolved that property acquired during the marriage should be shared.

9. Be it resolved that in sharing matrimonial property acquired during the marriage the following factors should be considered:
   1) existence of dependent children,
   2) the length of the marriage.

10. Be it resolved that in sharing matrimonial property the fact that only one spouse was remuneratively employed should not be considered.

11. Resolved that a sharing of property would take care of the continuing needs of both spouses.

12. Resolved that the earning power of one or both spouses is not the only substantial asset of couples in the majority of marriages.

13. Resolved that all after marriage debts of either spouse should be shared.

14. Resolved that the concept of sharing should include all after marriage debts assumed for the purpose of support of spouse or any child.

15. Concept of sharing re household allowance where it is given by one spouse to the other, that is, not as a common fund, is to be the acquired property of the receiving spouse (entire amount to be calculated in asset and not half as recommended by OLRC).

16. Resolved that spouses negotiate disposition of household goods whether in specie or in their money equivalent at the dissolution of marriage.

17. Resolved that legacies and gifts to spouses be included in sharing matrimonial property.

18. Resolved that sharing should be in kind or money or a personal claim of debt by agreement of both parties.

19. Resolved that if the bulk of the matrimonial assets is in the form of a business from which the family income has been received:
that the debtor-spouse at the dissolution of the marriage have the option to pay in installments but that the court have the discretion as to the terms of repayment so that the business will not collapse and that this debt take precedence over all subsequent debts.

20. Resolved that the property regime enacted include unmarried persons living together for 2 years as man and wife who may opt out of the regime.

21. Resolved that there should not be a presumption of guilt against the party that deserts in family property law settlements.

22. Resolved that any equal division of property should not be forced when a spouse is caring for children in the home.

23. Resolved that if married persons are not allowed to sue each other in tort for personal injury and damages, then physical and mental cruelty should be considered a factor in community settlement.

24. Resolved that separate domicile for the wife be provided for the purpose of determining property rights in Ontario, equivalent to the provisions of the Federal Divorce Act.

25. Resolved that:
1) Dower be abolished
2) That therefore any disentitlement based on dower be eliminated from the wife's rights on intestacy.

26. Resolved that the contributions of the non-wage earning spouse be recognized by re-allocating family income on a percentage basis so that income from one is remitted to the non-wage earning spouse.

27. Be it resolved that this Conference recognizes the principle that a non-earning home worker is an economic asset to the marriage, and should have a right to independent spending control of a percentage of the family's income.

28. Resolved that it is not sufficient to enact only co-ownership of the matrimonial home as property law reform.

29. Resolved that married persons be allowed to sue each other in tort for personal injury damages.

30. Resolved that further study is needed about joint administration of community property during marriage and that a committee be established to investigate this.

31. Resolved that the Council appoint a special committee including women with accounting and business experience to review the provisions regarding how pre and post marital debts are to be treated and what terms constitute those referred to in recommendation #2 (this section) e.g., a car, summer vacation, etc.

32. Resolved — that taxation statutes under both Federal and Provincial jurisdiction be reviewed in light of an in conjunction with any proposed changes in Family Property Law.

33. Resolved that there be an investigation into "houseworkers insurance" and fair remuneration for raising children and guaranteed annual income with specific reference to the system in France.

34. Resolved that the delegates be sent the resolutions submitted at this Conference and have the opportunity to discuss them in depth with their constituent organizations.

35. Resolved that all references to persons in all phases of the Report and Family Property Law be in non-sexist terms.

36. Resolved that co-ownership of the matrimonial home apply to all existing and future marriages.

37. Resolved that the matrimonial home should be co-owned whether or not it was acquired by either spouse prior to marriage.

38. Resolved that in giving the legislation which implements these proposals with regard to the matrimonial home retroactive effect, it should be provided that the principle of co-ownership should apply to matrimonial homes that were, on the effective date of legislation, registered solely in the name of a wife.

39. Resolved that if the matrimonial home is shared, the spouses should be responsible for mortgage payments with non-dollar value contributions to the family unit taken into consideration.

40. Resolved that neither spouse should be free to dispose of any interest in the matrimonial home unless the other spouse is made a fully-informed party to the transaction or by leave of the court.

41. Resolved that if the matrimonial home is shared — co-owned — the system of dower and courtesy should be abolished.

42. Co-ownership should apply to existing as well as future unions. This should apply to common-law relationships with dependant children.

43. Resolved that if a man and woman have co-habited for at least a year the principle of co-ownership should apply to a principal family residence acquired since they began to cohabit.

44. Resolved that where there are pre-school children, there should be a duty of the non-custodial parent to support the spouse who stays at home with the children.

45. Resolved that in the case of a child who is disabled, handicapped or mentally retarded and requiring full-time care in the home, there should be a duty of the non-custodial parent to support the spouse who stays at home with the child.

46. Resolved that support obligations of parents in respect of children should continue until a child attains the age of majority.

47. Resolved that support amounts should depend on circumstances in each case on basis of:
a) income of each party
b) financial needs of each party
c) age of the parties and duration of the union
d) physical disability
e) mental disability
f) contributions to the welfare of the family
g) value of benefit that either party will lose by
h) past standard of living
i) custody of the children
j) potential earning ability

48. Resolved that if one spouse does not have self-supporting occupational skills and is willing to undertake training, upon proof of need, such person shall be eligible for support from other spouse or failing that, government agencies.

49. Be it resolved that the parties to a marriage, or any "cohabiting relationship" should be free to contract with each other in regard to any matter whatsoever, with the exception of the matrimonial home.

50. Resolved that universal access to free child care be available.

51. Resolved that an order for support of children and/or spouse should have first priority over other debt orders or judgments.

52. Resolved that where a court orders maintenance and support payments, such payments shall automatically be made by one state and the onus shall be on the state to collect the money from the spouse against whom the court order has been made.

53. Whereas, much of the inequity of any property law system is the result of a lack of knowledge of the ramifications of marriage commitments,
We resolve that before a couple can be lawfully married, that they *shall* be required to receive legal counselling as to the ramifications of marriage, both immediately prior to marriage and as a program in the schools of the province.

54. Resolved that in order to acquire a marriage license, each prospective spouse must complete a course of instruction and examination in legal marital rights, obligations and liabilities.

55. Be it resolved that it is essential that all Ontario residents including minors be fully informed as to the provisions of the new legislation.

56. Resolved that the *Law and the Women in Ontario,* issued by the Women's Bureau should refer to the lawyer as either he or she, not just as he, and that the booklet needs revision concerning set stereotyping throughout.

57. Resolved:
a) That the province establish mandatory courses in high school to inform people of their legal rights and duties with regard to property and other aspects of marriage, and encourage colleges, universities and other organization or groups to establish similar courses;
b) That the province conduct a publicity campaign to inform citizens concerning the new system;
c) That material dealing with property rights be distributed to applicants for marriage licences.

58. Resolved that the government provide free courses and brochures on family property law which are required for all couples prior to marriage. Special emphasis on:

1. Implications of co-ownership
2. Equalization
3. Opting in and out

Resolved that similar courses and brochures be available to people who are presently married.

Resolved that an introductory course in family property law be implemented for high school students.

59. Be it resolved that a course of instruction and examination on the legal marital rights, obligations and liabilities be mandatory in the school curriculum for boys and girls.

60. Resolved that the Ontario Ministry of Education establish a compulsory course in law, to include family property law, for all secondary students.

# Keynote address

by DR. RICHARD GOSSE, Faculty of Law, University of British Columbia, Vancouver, B.C.

## Introduction

We are here — you are here — to consider and put forward proposals for the reform of Ontario's family property laws — in order that there should be economic justice between husband and wife — *fair shares*, if you like. A fair share — not just from the point of view of wives — but from the viewpoint of both wives and husbands.

Based as it is on the separate ownership of property, the present system, in its failure to recognize generally non-monetary contributions by spouses, wreaks injustice for every day that it continues to exist. We are all aware, I am sure, of instances where one spouse has walked away from a marriage, unjustly enriched at the expense of the other. *Murdoch* v. *Murdoch* — the case of the Alberta rancher's wife — should be firmly branded on our consciences, and provide us with the determination to do better.

What is your range of choice for basic reform? One might, of course, stick entirely with the notion of separate property, improving support obligation legislation and eliminating obvious inequities, such as the failure of the law to take into account the labour contribution of a spouse in the determination of property interests. At the other extreme, there is outright community of property, presumably with joint management of community assets during the marriage. In between these two extremes one could have a limited community regime imposed on a separate property system. This could entail co-ownership of the matrimonial home and, perhaps, household goods, the family car and other assets normally used by both spouses. Matrimonial home legislation usually deals with the question of use as well as ownership.

Another choice is deferred community. The spouses manage their property separately during marriage, but then there is an equal division when the marriage terminates.

There is also the possibility of relying on the use of judicial discretion to make property adjustments between spouses, based on some suitable guidelines.

Some of these choices may be viewed together. One could combine, for example, matrimonial home legislation with either a deferred sharing scheme or with a judicial discretion provision. The judicial discretion technique could be used as a system in itself or it could be used to temper what might be considered the inequities that might arise under a rigid regime of 50-50 sharing.

We have the advantage and disadvantage of having one choice developed in

detail by your Law Reform Commission — a regime based on deferred equal sharing, with no overriding judicial discretion, combined with special provision for the matrimonial home. The disadvantage of having this developed point of view, for some of you, may be that it will be difficult to measure other choices against the Commission's proposals. Some of you might be tempted by outright community which would give joint control during marriage. But we have little in the way of material to show us how a community regime would work in Ontario.

I should like to say at this point that I come here as neither an advocate for, nor as an opponent of, the proposals put forward by the Ontario Law Reform Commission. What I propose to do is to say something about choices generally, refer to two or three policy issues in the Ontario Report, discuss Bill 117 now before your Legislature, and outline to you briefly what is currently going on elsewhere in Canada — in the hope that this will provide some sort of context in which your deliberations can take place.

Before doing so, I would like to ask three questions without attempting to answer them at this point:

1. Is marriage an economic partnership? And, if so, to what extent?
2. If marriage is to be regarded as an economic partnership, to what extent, if any, should the actual contributions or the conduct of the spouses be taken into account in the division of property?
3. If there are to be changes in Ontario's family property law, will those changes apply to existing marriages?

Now, with regard to choice, I propose to say something briefly about separate property, community regimes and the use of judicial discretion.

**Separate Property** This is based on the simple notion that, gifts apart, "It's mine if it was bought with my money". It is the best system, in economic terms, from the point of view of the spouse earning the most dollars. Some would argue that, so long as support obligation legislation is appropriate and there is a provision such as that in Bill 117 under which a Mrs. Murdoch's contribution will be recognized, to which I will refer later, separate property is the fairest — as it gives credit to the efforts of the dollar-earner. I will not push this line too hard here. I will leave that to the Canadian Manufacturers Association to follow up. The separate property system ignores the social contribution to the marriage of the spouse who is non-earning or who provides the smaller economic contribution. It also does not take into account that one spouse, usually the wife, by marriage may, at least partially, give up an earning position, and the opportunity to acquire assets. Also, that spouse may suffer a deterioration of his or her earning power owing to the absence of opportunity to exercise and develop skills in a dollar-earning job. Even where the spouses are making equal contributions in terms of dollars, the separate property system may not be fair unless each spouse is carefully guarding her or his

position with an eye to the future termination of the marriage. If "her" dollars are paying for the groceries and other consumable goods and "his" dollars are used in the making of mortgage payments and in the acquisition of stocks or bonds (all of which are in his name), the wife would end up with nothing. There is no sharing under separate property — let alone a fair share.

**Community** Community provides a system of co-ownership, generally with respect to all property acquired by either spouse during the marriage. It will apply to a spouse's pay cheque or the acquisition by one spouse of a house or a business. The management of the community asset during the marriage may be under the control of one spouse or the other. In Quebec, it was in the husband. In the State of Washington, it is joint. If you wish joint management during marriage, it means that you are looking at community. Joint control, by the way, means that *either* spouse may deal with the community property.

At first glance community sounds simple, and it is appealing to idealists. But it is just as complicated as a deferred sharing regime, maybe more so. Similar problems arise with regard to property to be included and excluded, the treatment of debts, pension funds and insurance, and the application of the regime to spouses who move in and out of the jurisdiction. Problems arise on the exercise of joint control during the marriage and the division of the "mass" of community property when marriage terminates.

Income tax poses a special problem for community in Canada. If community were adopted, the income of the spouses would be pooled as community, but, under our income tax laws as they now are, a spouse would have to pay tax on the amount he or she earned. If the spouses were to be able to file tax returns based on an equal division of their pooled income, special concessions would have to be made by the Federal Government. It would no doubt expect the Province to bear the loss of revenue that would otherwise fall on the federal treasury from the spouses together paying less total tax through the application of lower tax rates to their equally divided pooled income.

**Judicial Discretion** Judicial discretion may be given to the courts to transfer assets from one spouse to another on the basis of what would be fair and equitable. The courts may or may not be given guidelines to provide a basis for the exercise of their discretion. Such an approach has been taken in New Zealand, England, British Columbia and the Northwest Territories. I will refer to the last two jurisdictions later.

Since 1963, there has been legislation in New Zealand which directs the courts, in property disputes between husband and wife, to have regard to the respective contributions of the spouses to the property in dispute (not to the marriage) — whether the contribution is "in the form of money payments,

services, prudent management, or otherwise howsoever", or "was of a usual and not an extraordinary character". The courts are required to have regard for these matters in the case of the matrimonial home and *may* have regard for them "in any other case". The wrongful conduct of a spouse is not to be taken into account in such an exercise, except where it is related to the property in dispute, whatever that may mean.

The provision says nothing about sharing as a matter of principle, and the Court of Appeal in New Zealand has made it clear that the courts cannot use the provision as a basis for a general equal sharing. That Court has said that the extent of the wife's interest in any asset owned by her husband must be gauged on the basis of her contribution to that asset. This result has been criticized in New Zealand and I understand the provision is now under review.

In England, the use of judicial discretion was adopted in 1970, but is applicable only in divorce, nullity or judicial separation proceedings. The English Courts have been empowered to order that the property of a spouse be transferred directly to the other spouse or to the children of the marriage (or, in appropriate cases, to third persons for the benefit of the other spouse or the children). This power is to be exercised according to certain guidelines, so as to place the parties in the financial position in which they would have been if the marriage had not broken down:

i) so far as it is practicable and
ii) so far as it is just to do so, having regard to the conduct of the parties.

The guidelines for transfer between husband and wife are:

(a) the income of each spouse,
(b) their financial needs,
(c) their standard of living,
(d) their age and the length of the marriage,
(e) physical or mental disabilities,
(f) contributions made by either spouse to the welfare of the family, including any contribution made by looking after the home or caring for the family, and
(g) the value of pensions and other similar benefits that either party would lose the chance of acquiring by reason of the dissolution of the marriage.

The English provision does not expressly make sharing a principle, and takes into account some factors that would also apply in dealing with support obligations. Early indications, from the court decisions which have been handed down in England on this provision, are that it may be used as a basis for giving the non-propertied spouse a substantial share, varying in the circumstances, in the property of the other spouse. The use of discretion in this way leaves it to the courts to work out how debts and insurance should be treated and what property, if any, should be excluded from the operation of the provision.

The major drawback, of course, of the judicial discretion technique, is that the spouses will have no precise idea of what their property position is until the courts have made their ruling on the assets in question. Indeed, until there is a body of case law, the spouses may even have no general idea of what their position might be. Where businesses are concerned, such uncertainty would create problems.

## The report

**General** The Report proposes a regime of deferred sharing, the details of which will be familiar to all of you by now. Should you choose to reject that proposal, remember that the Report also makes worthwhile proposals for reform dealing with the matrimonial home, succession and other matters which can be treated independently of the proposed regime and which deserve your consideration. It also makes proposals for eliminating a number of anachronisms which should have been long gone before now.

I have read in the West that the Report proposals are too complicated, too ambiguous, and too paternalistic, that the Report has been overtaken by events, that it does not deal with such matters as income tax and succession duties, that it is wrong in its conclusion on this or that, and that it was biased because it was prepared by men.

The Report, which was nine long years in the making — too long, of course — does, however, represent a lot of intellectual sweat and good intentions. It is not difficult to find fault with. But any massive proposal for the reform of our matrimonial property laws would have some shortcomings, and contain conclusions that would not please everybody. I would urge this Conference to approach the Report constructively. Reject the deferred sharing proposal if you must, but give it a fair hearing. If you do reject it, then I suggest to you that it is your responsibility to come up with an alternative.

**Equal Partnership** I should like to dwell for a moment on the equal partnership aspect of deferred sharing. Is it basically fair? Is it too rigid? Is the contribution of a wife who stays at home for a number of years and raises the kids and runs a fine household to be treated equally with the contribution of her dollar-earning husband? Are we creating a legal fiction to make two different kinds of contribution equal? If we are, will it work in the long run? The proposal, as you know, is for a firm 50-50 split and there is to be no discretion in changing those proportions by taking into account the actual contributions or conduct of each spouse. Let us suppose it is the wife that owns and operates the ranch, and the husband is an invalid or hopeless alcoholic. Is every dollar she saves to be shared 50-50 with her husband? On the other hand, do we wish every division of matrimonial property to be subject to a squabble over who contributed what effort or who was

misbehaving. We are getting rid of fault as a ground for divorce. Do we bring it back for division of property?

What we need to decide is what system will be fairest overall. It is not easy.

I would remind you that the Royal Commission on the Status of Women in Canada (which consisted of five women and two men) endorsed, in 1970, the principles of equal partnership and deferred sharing put forward in the Ontario Law Reform Commission Report. The Status of Women Commission, however, did express concern that deferred sharing did not solve the problem of financial security during marriage for the spouse who does not accumulate assets through paid employment. The Status of Women Report stated:

> If a system could be devised whereby equal rights to matrimonial property were to be realized during marriage, it would provide greater security for married women in this position and more fully express the true sense of partnership between married persons.

**Equality of Sexes** The Report makes a small number of recommendations which could lead to legislation under which husbands and wives would not be treated equally. Under the heading of support obligations, for example, it is proposed that spouses should have the legal obligation to contribute, according to their means and ability, to their mutual support but that the *primary liability* for financial support rest upon the husband.

I suspect that an all-woman body would not have made this distinction, on the ground that it offends the principle of equality of the sexes. You may not like this question but: Is the principle of equality worth the price, to the married women of Ontario, of giving up the imposition of primary liability on husbands? You may wish to keep an eye out for other recommendations that offend the principle of equality.

**Application of Reform Measures** I might raise at this point the question as to whom matrimonial property law reforms are to affect. Existing marriages? Is your concern for yourselves and women like you? Are you representative of the women of Ontario? Views may vary depending on your own economic and social status and that of your husband, whether you are married, how long you have been married, and what you think about marriage. Let me say that, regardless of the needs of women who are married now, the impact of legal reforms on those who will be marrying in the future may be far more important. There are some three million unmarried young people in Ontario whose lives may be affected sooner or later.

Nevertheless, there are many Mrs. Murdochs who need protection now.

A critical problem with the introduction of a new regime is its applicability to existing marriages. The Commission's proposal on deferred sharing is for opting in by agreement between the spouses. My guess is that, even with a well-publicized campaign on the part of the Government promoting opting in, only a small proportion of couples would agree to opt in — mainly out of inertia, but also through the resistance of one spouse or the other.

Requiring couples to opt out, on the other hand, might well result in 90% of marriages being governed by a new regime. This is very attractive on the surface. By opting out, we could mean either by unilateral declaration or by agreement between the couple. If agreement was required and one spouse did not want to be governed by the new regime, and the other did, the regime would apply. Some would undoubtedly scream at such a result. A husband could be worth one day half what he was worth the day before. A kind of expropriation without compensation, he might say. Such an approach might lead to some pretty hard interspousal bargaining, a rush to the divorce courts before the new regime became effective, or even moving to a more amenable jurisdiction.

Opting out by unilateral declaration — say within a limited time after the regime took effect — would probably leave a large majority of existing marriages covered by the regime. But, undoubtedly, there would be opting out by one spouse in some marriages where the other spouse needed protection.

The difficulties of introducing a new regime are not all surmountable. There are advantages and disadvantages to any method of introduction.

One very strong argument for introducing judicial discretion legislation, apart from a new regime, is that it could apply to existing as well as future marriages. This is the case with the New Zealand, English, Northwest Territories and British Columbia legislation. The same argument can be applied to matrimonial home legislation.

**Too Much Detail** As for the criticism that the Report is too complicated or too detailed. While one may not agree with some of the detail, certainly I do not think the Commission should be faulted for attempting to deal with issues that it could foresee would come up under its proposed scheme of deferred sharing. It is true the Legislature could adopt a simple scheme: "All property of married persons shall be jointly owned by them". What that would mean, i.e. the details, could be left to the courts. But is it safe to do that? Not every problem can be anticipated, but if you can reach conclusions about the problems that can be detected in advance, is it not better to provide for them — so people will know where they stand and not have to go to the expense of court proceedings to get an answer?

**The Man's Point of View** It is natural enough for women's groups to be seeking reform based on a fair share of matrimonial assets for married women. But there has been very little response from men or men's groups to reform proposals. I am disturbed by this. It seems to me that, if marriage is regarded as a partnership and we need to develop an arrangement for sharing matrimonial property, solutions should be sought by men and women working together. I assume men do have a point of view on this subject. This may all lead to something that will be called the masculinist movement.

## Bill 117

On June 25 of this year, your Attorney General introduced Bill 117 in the Ontario Legislature — *The Family Law Reform Act, 1974.* At that time the Minister announced it was his intention to give the Bill first reading then and to proceed with it later on in the Session when response and considered comments had been received. Whether the response he has received was beyond his expectations, I do not know. Whether the Bill still lives, I do not know. However, I would like to make a few comments about it. Its provisions can be grouped in two categories — first, those that were taken from the Ontario Law Reform Commission Report on Family Property Law, together with a provision that was designed to deal with *Murdoch*, and, second, those that were taken from the Commission's Report on Torts in the Family, made to the Attorney General in 1969.

The most important of the provisions in this second category, perhaps, is that which will allow spouses to sue one another in tort — e.g., for damages for assault or negligence. At the present time if a husband beats up his wife, even if they were separated, and she suffers severe facial injuries leaving permanent damage and lost wages for time off work while recovering, she is unable to sue her husband for damages. If she suffered injuries in an automobile owing to her husband driving very badly, she cannot sue her husband for damages for negligence and ultimately recover from her husband's insurance (although his mother or girl friend could in the same circumstances). It is high time that this deficiency in the law was remedied. Why it has taken successive Attorneys General five years to act on these recommendations it is difficult to comprehend. This is what I refer to as legislative drag.

There were other recommendations in the Commission's 1969 Report, dealing with loss to a spouse of the services, society and support of the other spouse or of a child, which are not dealt with in Bill 117. For example, the Commission recommended that the old common law action of criminal conversation — the right of a husband (but not of a wife) to recover damages from a person who commits adultery with his wife — should be abolished. Ontario can still proudly proclaim that such an action can be brought here.

Insofar as those provisions in Bill 117 that deal with family property law are concerned, these seem to be based on a small selection from the 165 recommendations made in the Commission's Family Property Law Report, except for the one clause that purports to deal with *Murdoch* — section 1(3)(c). What the Attorney General seems to have had in mind was to implement some of those recommendations that could be hived off from the basic matrimonial property scheme proposed by the Commission and to throw in section 1(3)(c) as a temporary stop-gap of his own, which would operate until such time as there was new general legislation. He said, on introducing Bill 117:

> *It is my belief that the question of positive rights to share family property, and the question of the matrimonial home, should be dealt with in legislation specifically addressed to it and not in a general family law reform statute.*

While I am not sure that that is a good reason, it is, nevertheless, his reason for not proceeding legislatively now with the Ontario Commission's proposed scheme, or some other scheme. I would say, however, that the Minister is very wise not to rush into the adoption of any far-reaching scheme until he is satisfied that the people of Ontario will respond positively to it. I understand that he has been busily engaged in that kind of exercise and that this Conference is part of that operation.

A word about section 1(3)(c). It would only remove the very worst feature of *Murdoch*. The provision would only apply where:

1. A spouse contributes *work*, money or money's work in respect of a *business* in which the other spouse has a property interest, *and*

2. where such contribution is beyond the contribution that relates directly to the family residence, *and*

3. where such a contribution, if made by some person other than a spouse, would give rise to a right to compensation.

The provision is no help to a Mrs. Murdoch who spends her time raising half a dozen kids and running the ranch-house as a family residence. Even where a spouse is entitled to invoke the provision, the spouse would only be entitled to claim compensation for his or her contribution — perhaps on the basis of minimum wage rates. The provision has little to do with the concept of sharing.

If Bill 117 is to be proceeded with, perhaps it might be suggested to the Attorney General that section 1(3)(c) be amended to apply to any property of a spouse, not just business properties.

Bill 117 is a small step forward. You may wish to ask yourselves if, at this stage, there may be no objection to the Government proceeding with it at once, subject perhaps to some modifications and providing there was assurance from the Attorney General that he would immediately get on with preparing legislation that will go to the heart of the matter.

## Elsewhere in Canada

Ontario is not considering the problems of matrimonial property in isolation. Every Province in Western Canada, for example, is currently examining possible solutions. The federal Law Reform Commission is considering the subject. Perhaps it will help to give us focus here if I may outline for you very briefly some directions which are now being taken elsewhere in Canada. Those responsible for developing those directions have had the benefit of being able to use the Ontario Law Reform Commission's Report in their deliberations.

**Ontario and B.C.: Their Neighbours** First of all, I might point out that both Ontario and British Columbia have had the advantage of being immediately adjacent to jurisdictions with community property regimes — Ontario for nearly two centuries and British Columbia for over a century. But there never seems to have been much interest in the systems of our respective neighbours — Quebec and the State of Washington — until very recently. Any suggestion in the past that we might adopt those systems would have produced looks of incredulity. Now we both seem to be moving towards the adoption of the system of our immediate neighbour. Community in Quebec meant, of course, control of the matrimonial assets by the husband during the marriage, unless the spouses contracted otherwise. That situation became increasingly unsatisfactory and led to the adoption in 1970 of the regime of "partnership of acquests", which is a system of deferred community similar to that now put forward by the Ontario Law Reform Commission. There is a comment in the current issue of the Canadian Bar Review by Professor H. R. Hahlo of McGill sounding some notes of warning about the new Quebec regime. In British Columbia, some enthusiasm is being shown for Washington's immediate community, under which matrimonial assets are under the joint control of the spouses during marriage. However, British Columbia is yet a long way from adopting community, a matter to which I will allude again shortly.

**The West** Secondly, I wish to refer to current happenings in Western Canada.

(i) Northwest Territories

On June 28 of this year, the Northwest Territories enacted legislation that deals with the matrimonial home in particular and property of the spouses in general. The legislation is designed to prevent a spouse who has title to the matrimonial home from disposing of it without the consent of a spouse without title. Now, where a disposition of the matrimonial home is made

without the necessary consent, the non-titled spouse becomes entitled to claim damages from the other, equivalent to one-half of the value of the property. In addition, however, all real and personal property of a spouse is made subject to a judicial discretion where there is a dispute between the spouses over ownership, possession or disposition. The judge is empowered to make such an order for the division of the property in question as he considers "fair and equitable" and for that purpose he may take into account "the respective contributions of the husband and wife whether in the form of money, services, prudent management, caring for the home and family or in any other form whatsoever". This latter provision, which bears some resemblance to the New Zealand legislation, should overcome some serious inequities, but it will not necessarily lead to an equal sharing.

(ii) Alberta

In Alberta, the Legislature passed a resolution in March, 1971, by which the Provincial Government was asked to request the Alberta Institute for Law Research and Reform to study the feasibility of a deferred equal sharing scheme which would apply on divorce. It is almost burlesque that *Murdoch* v. *Murdoch* should have emerged from that Province two and a half years later.

In April of this year the Alberta Institute, having done its homework well, issued a Working Paper in which the Institute, without putting forward a firm proposal, discussed the various choices open and invited comment from the public. While the Institute did not commit itself, I read the Working Paper as frowning on community and as viewing deferred sharing with lack of enthusiasm, owing to the rigidity of those two regimes. What seemed to be preferred was the English approach to the allocation of property among the spouses and children by judicial discretion based on statutory guidelines, with special provision for co-ownership of the matrimonial home.

The deadline the Institute has set for comments is October 31st, and it hopes to make its Report, with definite recommendations, early next year.

(iii) Saskatchewan

Saskatchewan's Law Reform Commission issued a Mini Working Paper in June of this year discussing the problems of the existing law of matrimonial property in that Province. Last month a second paper put forward a summary of possible solutions, including community and deferred sharing, without firmly committing the Commission to any of the solutions. A third paper setting out the Commission's tentative proposals is scheduled for the end of this month. The second paper, however, does indicate that the Commission does not prefer community. It states that the advantages of the theoretical simplicity of community would be over-shadowed by the disadvantages of rigidity, the inconvenience and inefficiency of joint control, and lack of familiarity with a regime that is alien to our legal system. The Commission

thought the adoption of a community regime could very well create more problems than it would solve. It pointed out that such jurisdictions as Sweden, Denmark, Norway, West Germany and Quebec have all moved from community to forms of deferred sharing.

(iv) Manitoba

The Manitoba Law Reform Commission is currently working on matrimonial property and hopes to produce a working paper containing proposals by the end of the year. At this stage, indications are that the Commission is commited to the notion of a right to a division of property and that it finds the judicial discretion technique appealing.

(v) British Columbia

British Columbia, in 1972, enacted the *Family Relations Act*, which was an attempt at a comprehensive statute dealing with family law matters within Provincial jurisdiction. There is an innocent-looking provision, section 8, in that statute, which for the past two years has been ticking away like a time-bomb. Section 8 simply provides that where a court makes an order for divorce, judicial separation or annulment of a marriage, and it appears that a spouse is entitled to any property, the court may make any order that, in its opinion, should be made to provide for the application of all or part of that property, for the benefit of either or both spouses, or a child of a spouse or of the marriage. No guidelines were given and family law lawyers waited breathlessly to see what the courts would do with this provision. In February of this year, a British Columbia Supreme Court judge, in *Stevenson* v. *Stevenson*, a case arising in the context of divorce proceedings, held that section 8 gave him a judicial discretion unfettered by *Murdoch*. In the case, the wife claimed both the matrimonial home which she owned jointly with her husband and the cottage which was in the husband's name. She was successful with regard to the home, but not the cottage.

There is some irony in the source of section 8, which no one drew attention to at the time of its enactment. Prior to 1972, British Columbia had a splendid Victorian provision inherited from England in 1858. It read much the same as section 8, except that it applied only to the wife's property where a divorce or judicial separation decree was based on her adultery. The courts were given a discretionary power to award her property to the innocent party, i.e., the husband. The clever draftsman in 1972 achieved a major reform by carrying the old provision into the new legislation and by deleting the reference to wifely misbehavior and substituting spouse for her and also for the "innocent party".

You are thinking that Ontario would never have kept for so long on her statute books such a Victorian provision, as we did in British Columbia until 1972. Let me tell you that you have had since 1931 and still have today (as section 3

of *The Matrimonial Causes Act*), an identical provision, except that the wife's property can only be settled for the benefit of the children or, believe it or not, the grandchildren of the marriage. (We better keep an eye on Granny!) How any Attorney General (whether male or female) could, in these times, allow such a provision to remain part of the legislation of this Province is beyond my comprehension.

Back to British Columbia. In that Province these days we are not satisfied with half-measures (i.e. section 8 of the *Family Relations Act*), and there are indications that we may be headed towards the adoption of a community property regime. The Family and Children's Law Commission (the "Berger" Commission), established by the Provincial Government a year ago has a Working Group on Matrimonial Property. The position papers prepared by members of that group in the past few months, and which have been made available to the public, show that that Working Group, which is chaired by one of the Commissioners — a woman, I might add — is in favour of a community regime, with joint management during the marriage. This Working Group would apply their regime to property acquired during marriage, except for gifts (including inheritances). They propose that the matrimonial home should always be jointly owned, whether acquired before or after the marriage. The Working Group has yet to decide on the application of this regime. The proposal before the Working Group is that the regime should apply to married couples, including those who are married at the time of the Province's change-over from separate to community property, unless couples contract out. Where a couple is already married, and they do not contract out, the community regime is to be retroactive to the time of the couple's marriage. Similarly, unless they contract otherwise, couples moving into British Columbia are to be subject to the community regime retroactive to the time of their marriage. The proposal under consideration by the Working Group is, of course, a long way from legislative adoption if the usual routes of legislative process are followed. The Berger Commission itself will have to decide whether it will accept the proposals of its Working Group, or adopt some other scheme, and, as you know in Ontario, there may be, for political or other reasons, a long time lag between a Commission's recommendations and legislative implementation.

**The Federal Presence** The present *Divorce Act* is, as you know, silent on the subject of matrimonial property. It does deal with custody and maintenance, which until 1968 had been left entirely to the Provinces. Divorce courts have sometimes, however, got at a distribution of matrimonial property under the guise of making, or threatening to make, orders for lump sum maintenance payments.

It must be conceded that there would be grave constitutional doubts about the validity of including matrimonial property provisions in divorce legislation.

It is only recently that the Supreme Court of Canada has held the custody and maintenance provisions of the *Divorce Act* valid. But matrimonial property raises different constitutional considerations and I would doubt that we will ever see the enactment of a federal matrimonial property regime which applies only on divorce. The relationship of such a regime to differing provincial regimes which applied in other circumstances, such as separation before divorce or on death, is too horrendous to contemplate.

The Law Reform Commission of Canada has, however, entered the matrimonial property area on the grounds that federal leadership in the search for solutions will help to promote uniformity, or at least compatability, in this field, as well as bringing light to bear on the relationship between property and maintenance, the latter being a matter of federal legislative concern. At the National Conference on Law and Women held in Windsor, Ontario last March, it was revealed that the federal Commission would publish a Working Paper on matrimonial property in the near future and completed sections of the tentative draft were distributed to members of that Conference. At that stage, it seems clear that those responsible for developing the federal Commission's thinking were leaning towards deferred sharing. It was stated that "Essentially the deferred community property regime does resolve the major problems by ensuring that the married woman receives a fair share of property acquired during the course of the marriage". It was suggested that the rigidity of an equal sharing scheme might be softened by an overriding judicial discretion to the few situations where fairness and justice required some variation.

However, the federal Commission has yet to reach the publication point. I would expect that this would happen in the next few months. I hope we will get something of substance that will be helpful to all of us.

## Conclusion

I have tried to give a perspective for your discussions at this Conference. I am sure that we can start the Conference in general agreement that legislative action is necessary now. Through the Conference, the Attorney General and the Government can be urged to get on with the job of legislating and, through the Conference, you have the opportunity of influencing the direction that the legislative action should take.

I wish you well.

# Delegates organizations

Ontario Association for Continuing Education
Business & Professional Women
YWCA of Metropolitan Toronto
Assoc. of United Ukrainian Canadians
Assoc. of Universities & Colleges
Canadian Federation of University Women
Canadian Home Economics Assoc.
Canadian Housewives Register
Canadian Negro Women's Assoc.
Canadian Polish Women's Federation
Catholic Women's League
Children's Aid Society — Metro
Community Action Resource Centre
Confederation College
C.U.P.E. — Ontario Division
Family Service Assoc. of Metro Toronto
Federated Women's Institute
Federation of Catholic Parent-Teacher Assoc.
Federation of Jewish Women's Organizations
Federation of Women Teachers Assoc. of Ontario
Guelph Women's Centre
Hadassah-Wizo Organization
Hamilton Status of Women
I.O.D.E.
Junior League of Toronto
Kitchener-Waterloo Social Planning Council
Lakehead Social Planning Committee
Liberal Party of Ontario
London Women's Resource Centre
Mayors Task Force — Toronto
National Action Committee on the Status of Women
National Secretaries Assoc.
New Democratic Party
Niagara Action Group
Northern Women's Centre
Ontario Anti-Poverty Organization
Ontario Assoc. of Professional Social Workers
Ontario Committee on the Status of Women
Ontario Federation of Home & School Assocs.
Ontario Federation of Labour
Ontario Metis & Non-Status Indians
Ontario Welfare Council
Peterborough Women's Place
Planned Parenthood of Ontario

Planned Parenthood of Toronto
Probation Officers Assoc.
Progressive Conservative Women's Assoc.
Provincial Council of Women
Salvation Army Women's Organization
Sarnia Anti-Poverty Coalition
Sudbury Regional Information Centre
Toronto Women's ORT
Unitarian Council of Metro Toronto
University of Ottawa Women & the Law Assoc.
Voice of Women
Women for Political Action
Women's Place — Windsor
Women's Action Group
Women's Inter-Church Council of Canada
Woodstock Women's Centre
Y.W.C.A. of Canada
Zonta Clubs
Canadian Civil Liberties Union
National Anti-Poverty Coalition
Canadian Council on Social Development

# Communities represented

Agincourt

Barrie
Beamsville
Beeton
Belleville
Bramalea
Brantford
Brighton
Brockville
Burlington

Carleton Place
Chatham
Cobourg
Cornwall

Don Mills
Downsview
Dryden
Dunnville
Dundas

Elliott Lake
Embro
Etobicoke

Fonthill
Fort Frances
Freelton

Goderich
Guelph

Hamilton

Islington

Jackson's Point

Kalefield
Kammistiquia
Kars, R.R. #1
Kemptville
Kenora
Keswick
Kingston
Kirkland Lake
Kitchener
Komoka

Lakefield
Lambeth
London

Manitouage
Marathon
Markham
Merrickville
Mildmay
Milton
Mississauga
Moose Factory

New Hamburg
Niagara Falls
Nipigon
North Bay

Oakville
Orillia
R.R. #6, Orillia
Oshawa
Ottawa

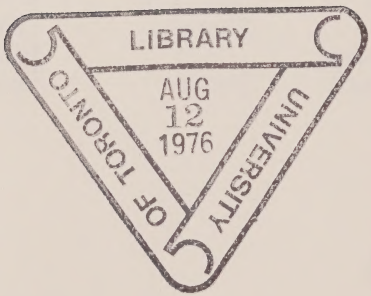
Penetanguishene
Pembroke
Petawawa
Peterboro
Porcupine
Port Colborne
Port Perry
Prescott

Rexdale

St. Catharines
Sarnia
Sault Ste. Marie
Sioux Lookout
Scarborough
Simcoe
R.R. #3, Simcoe
Smooth Rock Falls
Stratford
Stroud
Sudbury
Sunderland

Thornhill
Thunder Bay
R.R. #1, Thunder Bay
Timmins
Toronto
Trout Creek

Waterdown
Waterloo
Welland
Weston
Willowdale
Wilsonville
Windsor
Woodstock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